

**PROCUREMENT GUIDE
FOR
LOCAL GOVERNMENTS
RECEIVING GRANTS
(STATE OR FEDERAL)
FROM THE WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES**

Issued by:
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INTRODUCTION

DISCLAIMER

This document sets out bidding requirements that local units of government must meet to ensure that the Department of Natural Resources (DNR) can process grant reimbursement requests. The document is **not** a comprehensive review of all bidding law requirements. Consult your attorney with detailed questions about compliance with bidding laws.

DNR personnel are not qualified or authorized to provide legal advice to local units of government concerning bidding laws.

What follows is an explanation of what the DNR will be looking for prior to issuing reimbursements to grantees. Municipalities cannot generalize this guidance to other situations. Bidding laws are complicated, with different requirements for cities, towns, villages, and counties. Because of this complexity, local units of government are urged to work with their attorneys to ensure compliance with all bidding laws.

BACKGROUND

Since moneys collected from taxpayers are typically used to underwrite grant and loan programs, efforts to contain project costs are in the public's interest. There are several cost-containment strategies; the most common is known as "competitive bidding".

In general, state law requires local units of government to competitively bid for "public construction" when the estimated cost exceeds \$15,000. If the estimated cost is between \$5,000 and \$15,000, Wisconsin Statutes require that municipality issue a class 1 notice concerning the proposed project before a contract is executed. In addition to state law, some municipal ordinances may have competitive bidding requirements.

Recipients of grants and loans from the DNR must comply with applicable state bidding and contracting requirements. See Part 1 below. In addition, grants or loans funded with Federal monies require specific bidding procedures. See Part 2 below. We recommend grant recipients consult with their attorneys to ensure compliance with all bidding requirements and procedures.

NOTE: Failure to comply with bidding requirements may result in your reimbursement being withheld.

PART 1. REQUIREMENTS WHEN GRANTS ARE FROM STATE SOURCES

DETERMINE BIDDING METHOD

When bidding for *supplies, services, or construction*, we suggest the following table to determine bidding method. Construction projects cannot be divided into smaller contracts to avoid bidding. While some exceptions exist (see pp. 4-6), it is good business practice to obtain price quotes whenever possible. Grant recipients should consult with their attorneys when determining if the exceptions apply to your situation.

BIDDING METHODS					
Estimated Contract Amount	Villages	Cities	Towns	Counties	Municipal Districts
\$0 - \$5,000	Obtain Quote	Obtain Quote	Obtain Quote	Obtain Quote	Obtain Quote
\$5,001 - \$15,000	Quote - Publish Class 1 notice	Quote - Publish Class 1 notice	Quote - Publish Class 1 notice	Quote - Publish Class 1 notice	Quote - Publish Class 1 notice
\$15,001 - \$25,000	Bid - Publish Class 2 notice	Bid - Publish Class 2 notice	Bid - Publish Class 2 notice	Quote - Publish Class 1 notice	Bid - Publish Class 2 notice
\$25,001 and Over	Bid - Publish Class 2 notice	Bid - Publish Class 2 notice	Bid - Publish Class 2 notice	Bid - Publish Class 2 notice	Bid - Publish Class 2 notice

- Quote: Obtain and document quotes from several sources to obtain the best price. Telephone vendors and ask them to submit a written estimate/quote for goods or services. Maintain a file with the names of vendors contacted, the written quotes obtained, and a written explanation of the vendor selected (if not low bidder). Purchases over \$5,000 and less than \$15,001 require the publication of a Class 1 notice.
- Bid: Obtain bids through with the publication of a Class 2 notice.

WRITE AND PUBLISH NOTICES, IF REQUIRED

Solicitations should clearly set forth all requirements that the bidder should fulfill in order for the bid to be evaluated by the recipient. As indicated in the table above, the following notices should be placed:

- Class 1 Notice — Publish a request for price quotes *one* time in the newspaper designated by the municipality's governing body as the official newspaper of public record. (See **Attachment A** for an example of a Class 1 written notice.)
- Class 2 Notices — Publish a request for bids *two* times (once each week for two consecutive weeks, the last of which should be at least one week before the bids are opened) in the newspaper designated by the municipality's governing body as the official newspaper of public record. (See **Attachment B** for an example of a Class 2 written notice.)
- Proof of Printing — To document compliance with the procurement guidelines, obtain proof of printing in the form of an *Affidavit of Publication* from the publisher and store this with the grant records.

SELECT VENDOR

- The recipient should be alert to conflicts of interest. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of these parties, has a financial or other interest in the firm selected for a contract. No employee, officer, or agent should participate in the selection, award, or administration of a contract if a real or apparent conflict of interest would be involved.

- In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft bid specifications, requirements, statements of work, and invitations for bids and/or requests for proposals should be excluded from competing for such procurements.
- For quotes, awards should be made to the vendor whose quote is responsive to the solicitation and is most advantageous to the recipient, considering price, quality and other factors.
- For bids, the award should be made to the lowest responsible bidder.

BIDDING EXCEPTIONS

1. **PURCHASES FROM OTHER UNITS OF GOVERNMENT.** Any local governmental unit may make purchases from another unit of government, including the state or federal government, without bidding. (See sec. 66.299(2), Wis. Stats.)
2. **MUNICIPALITIES MAY PERFORM THE WORK.** A municipality can avoid the bidding process by performing the work itself. This exception allows municipal personnel to do the work, but it does not allow the municipality to serve as a general contractor and negotiate with subcontractors to do the work. (See *Elliott v. Morgan*, 214 Wis. 2d 253, 571 N.W. 2d 866 (Ct. App. 1997))
3. **CITIES AND VILLAGES ONLY BID FOR “PUBLIC CONSTRUCTION”.** Public construction consists of activities and public improvements which require the combination of materials, supplies, and labor. It is rare that mere maintenance and other public works which do not involve the actual combining of materials and labor with a definable end result would constitute public construction. [See Natkins, Smith & Van Swearingen, *Public Constructions in Wisconsin*, p. 50 (1985)]
4. **EQUIPMENT; IN GENERAL.** “Public contract” means any contract for the construction, execution, repair, remodeling, improvement of any public work, building furnishings of supplies, material of any kind whatsoever, proposal for which are required to be advertised by law. (See sec. 66.29(1)(c), Wis. Stats.) The definition of “public contract” has been previously interpreted by the Wisconsin Attorney General not to include equipment. Attorney General opinions have stated that farm machinery, a police car, and a heavy movable engine constitute equipment, are not supplies or material, and therefore are not subject to competitive bidding requirements. However, according to various court decisions, certain types of equipment that require contracted labor to install may be permanent fixtures, thus constituting improvement of a public work and requiring purchase by competitive bid. [See *State ex. rel Gisholt v. Norsman*, 165 Wis 442, 169 N.W. 2d 429 (1942); *Wisconsin Dept of Revenue v. Smith Harvestore Products, Inc.*, 72 Wis. 2d 60, 240 N.W. 2d 357 (1976).]

5. **EQUIPMENT; PLAYGROUND.** Playground equipment may not fall under the equipment exception to the bidding statutes. Building a playground typically involves the combination of materials, supplies, and labor and may, therefore, meet the definition of “public construction”. Much playground equipment is considered a fixture: the materials are placed on and secured into the ground, on real estate which has been devoted by a municipality to a playground, with the intention of making playground equipment a permanent fixture. Playground equipment, therefore, must be publicly bid if the estimated costs of the public construction exceeds the specified statutory amount. However, playground equipment for which the municipality performs the installation work itself, or for which the municipality contracts with another municipality for installation, is exempt from the bidding requirement.
6. **DONATIONS.** If part of the labor, materials, and/or cost of a public work project is donated, the project must still comply with bidding requirements, based on total project costs. However, the project does not have to comply with these requirements if all of the project’s cost, labor, and materials are donated or the supplies and materials are donated and the municipality does the installation work itself or contracts with another municipality for the installation work.
7. **CONTRACTS FOR SERVICES; IN GENERAL.** Contracts which are for the performance of services requiring scientific knowledge and professional skill are not considered the performance of “public construction” or public work and so need not be competitively bid. The general test to be applied in determining whether the work is considered “services” and is exempt from bidding requirements is whether it is impossible or impractical to draw specifications for the tasks identified in the contract. [*Waste Management, Inc. v. Wisconsin Solid Waste Recycling Authority*, 84 Wis 2d 462 (1978); *Aqua-Tech v. Como Lake Protections and Rehabilitation District*, 71 Wis. 2d 541 (1976).]

Examples of “services” exempt from competitive bidding include architectural services (76 AOG 182) and professional engineering services (*Aqua-Tech v. Como Lake; Flottum v. City of Cumberland*, 234 Wis 654).

8. **CONTRACTS FOR SERVICES; FEDERALLY FUNDED PROJECTS AND CONTRACTS FOR SERVICES.** If a project will be funded with federal funds, services are not automatically exempt from competitive bidding requirements. Depending on the dollar amount, compliance with federal bidding procedures may be required under 43 CFR 12.76.
 - If the contract is estimated to cost less than \$100,000, the Federal “small purchase” procedures should be used for contracts for services, supplies, or other property [See 43 CFR 12.76(d)(1)]. Under this procedure, a municipality must simply obtain an adequate number of quotes from a qualified number of sources. Public noticing is not required.

- If the project is estimated to cost \$100,000 or more, the sealed bid process (See 40 CFR 12.76(d)(2)) or the “competitive proposals” procedure should be used for contracts for services (See 40 CFR 12.76(d)(3)).
 - Under the sealed bid process, bids are publicly solicited and the contract is awarded to the lowest responsible bidder. The sealed bid process is the preferred federal method for procuring construction, according to 40 CFR 12.76(d)(2).
 - Under the “competitive proposals” procedure, a municipality must public notice the project (for services), and solicit an adequate number of bids. The bidders’ qualifications are evaluated and the most qualified competitor is selected, subject to negotiations of a fair and reasonable prices. The “competitive proposals” procedure, where price is not used as a selection factor, may only be used in the procurement of architectural or engineering services.

Attachment A - Example of a Class 1 Public Notice

Public Notice

[Show Project Name here]

[Show Village/City/Town/County/District Name here]

The [Village/City/Town/County/District Name] will be performing the following work:

The [Village/City/Town/County/District Name] will receive quotes for this work at the office of [Name of Office] located at [Address] until [Time], [Date]. Quotes will be reviewed and contracts will be awarded to the vendors whose quotes are most responsive to the solicitation and are most advantageous to the [Village/City/Town/County/District Name], considering price, quality and other factors.

Owner reserves the right to reject any and all quotes.

Chief Elected Official Signature: _____

Print Chief Elected Official Name: _____

Date: _____

Attachment B — Example of a Class 2 Advertisement for Bids

Advertisement for Bids

[Show Project Name here]

[Show Village/City/Town/County/District Name here]

The [Village/City/Town/County/District Name] will receive sealed bids for [Project Name] at the office of [Name of Office] located at [Address] until [Time], [Date]. All bids will be publicly opened and read aloud at that time.

The work for which bids are asked includes the following:

Bidding documents may be examined at [Name of Office] located at [Address]. Copies may be obtained from [Name of Office] upon deposit of \$ [Deposit Amount] for each set. Any unsuccessful bidder, upon returning such within 10 days after bid opening and in good condition will be refunded his/her deposit.

Any proposals shall be submitted in an opaque envelope, on the forms provided, and marked with the name and address of the bidder and accompanied by the bid security. If the proposal is sent through the mail, or other delivery system, the sealed envelope shall be enclosed in a separate envelope marked with the notation "BID ENCLOSED" and addressed to [Name of Office and Address].

[For contracts involving construction, insert the following paragraph]

No proposal shall be accepted unless accompanied by a certified check or bid bond equal to at least 5% of the amount bid, payable to Owner as a guarantee that, if the bid is accepted, the bidder will execute and file the proper contract and bond within 15 days after the award of the contract. The certified check or bid bond will be returned to the bidder as soon as the contract is signed, and if after 15 days the bidder shall fail to do so, the certified check or bid bond shall be forfeited to the Owner as liquidated damages.

Attachment B — Example of a Class 2 Advertisement for Bids (continued)

[For contracts involving construction projects over \$2000 paid partially or in full with federal funds, insert the following paragraph]

Minimum salaries and fringes to be paid on the project shall be in accordance with the prevailing wage rate scale established by the Federal Department of Labor (DOL). Attention is called to the fact that not less than the minimum salaries and fringes set forth in the Contract Documents must be paid on this project, and that the Contractor must ensure that employees and applications for employment are not discriminated against because of their race, color, religion, sex, national origin, or other protected class. Federal Labor standards program laws, including, but not limited to the Davis Bacon Act, the Copeland Anti Kickback Act, and the Contract Work Hours and Safety Standards Act will apply to all projects.

No bidder may withdraw his/her bid within 30 days after the actual day of the opening thereof.

Owner reserves the right to waive any informalities or to reject all bids.

Chief Elected Official Signature: _____

Print Chief Elected Official Name: _____

Date: _____

PART 2.

REQUIREMENTS WHEN FUNDS ARE FROM FEDERAL SOURCES

Grantees are required to comply with federal guidelines when receiving grants funded with federal money. The federal guidelines are detailed in Office of Management and Budget (OMB) Circulars and the Code of Federal Regulations. To assist you, we have prepared the following explanations of some of the more complex requirements.

CASH MANAGEMENT

DEPARTMENT must limit cash advances to you to the minimum amounts needed and the advances must be timed to be in accordance with your actual, immediate cash requirements in carrying out the project. The timing and amount of cash advances must be as close as is administratively feasible to the actual disbursements for direct project costs and the proportionate share of any allowable indirect costs.

You should maintain advances in an interest-bearing account.

You are required to return interest earned on advances to DEPARTMENT at least quarterly. You may keep up to \$100 per year for administrative purposes (\$250 if the grantee is a non-profit entity). Rather than sending the DEPARTMENT a check each quarter, you may deduct an amount equal to the interest from a subsequent reimbursement request.

LABOR STANDARDS

THE DAVIS-BACON ACT. This act requires that workers receive no less than the prevailing wages being paid for similar work in their locality. Prevailing wages are computed by the U.S. Department of Labor (USDOL) and are issued in the form of Federal wage decisions for each classification of work to be performed in the area.

Violation of the Davis-Bacon Act makes the contractor liable for unpaid wages and may result in suspension of payments, contract termination, and suspension or debarment of the contractor from participation in federally funded projects.

The US Department of Labor's website, www.dol.gov/dol/esa/public/programs/dbralindex.html contains additional information.

Contracts and subcontracts must include the required prevailing wage rate clauses (see the bidding guidance example of an Advertisement for Bids).

THE COPELAND "ANTI-KICKBACK" ACT. This Act requires that workers be paid at least once a week, and without any deductions or rebates except permissible deductions. Permissible deductions include taxes, deductions the worker authorizes in writing, and those required by court processes. The act also requires contractors to submit weekly payroll records and Statements of Compliance to the contracting agency. Regulations, Part 3, requires contractors and subcontractors on Davis-Bacon covered construction projects to submit each week a "statement of compliance" certifying compliance with the Davis-Bacon requirements. This "statement of compliance" is usually referred to as the certified payroll. This Act applies to all contracts covered by Davis-Bacon.

Violation of the Copeland Act is a felony and may result in termination of the contract or criminal prosecution by the U.S. Government, punishable by a fine of \$5,000, 5 years in prison, or both.

THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA). This Act requires that workers receive "overtime" pay at a rate of one and one-half times their regular hourly pay after they have worked 40 hours in one week on the federally funded project. The CWHSSA does not apply to contracts of \$100,000 or less however; the Fair Labor Standards Act will apply and overtime provisions are applicable to all contracts covered by Davis-Bacon.

Violation of the CWHSSA makes the contractor liable for unpaid wages, liquidated damages of \$10 per employee per day of violation, and, in cases of intentional violation, a fine of \$1,000 and/or six months imprisonment for each offense. Violations may also result in termination of the contract.

Applicability

Labor standards apply to all contracts for construction, alteration, or repair of a public building or public work, except as noted below.

Labor standards apply to all building or construction financed in whole or in part from federal funds or in accordance with guarantees of a federal agency, except as noted below.

Exceptions:

1. Public works constructed by your own employees, commonly called "force account" work. A letter stating that the work was performed with your own employees should be submitted with your grant reimbursement request. NOTE: There is no such thing as **private** "force account" work.
2. Residential rehabilitation in structures with less than eight (8) units.
3. Contracts that are part of a project of less than \$2,000 value.
4. Construction activities assisted solely by means of loans guaranteed with interest-bearing collateral accounts, where 1) the interest rate is the usual and customary rate on demand accounts; 2) the account is subject only to the usual and customary terms and conditions for collateral accounts; and 3) there is no "substantial likelihood" that the guarantee will be used.
5. Economic development projects where federal funds are used only for nonconstruction activities such as acquisition; machinery and equipment purchase (not including installation); stock (equity) purchase; and operating capital loans where such funds cannot be used for construction.

MATCHING

All contributions, including cash and third party in-kind, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria.

- Are verifiable from the recipient's records.
- Are not included as contributions for any other federally-assisted project or program.
- Are necessary and reasonable for proper and efficient accomplishment of project or program objectives.
- Are allowable under the applicable cost principles.
- Are not paid by the Federal Government under another award.
- Are provided for in the approved budget when required by the Federal awarding agency.
- Conform to other provisions of OMB Circular A-102 and OMB Circular A-110 as applicable.

Matching may be in the form of allowable costs incurred or in-kind contributions, including third-part in-kind contributions. The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties.

- Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.
- The basis for determining the valuation for personal service, material, equipment, buildings and land shall be documented.

PROCUREMENT

See "Part 1. Requirements When Grants Are from State Sources" beginning on page 1 of this document.

RECORDS RETENTION

Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of **three years** from the date of submission of the final expenditure report or, for awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, as authorized by the Federal awarding agency. The only exceptions are the following.

1. If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.
2. Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.
3. When records are transferred to or maintained by the Federal awarding agency, the 3-year retention requirement is not applicable to the recipient.
4. Indirect cost rate proposals, cost allocations plans, etc.
